

Dennis L. Isenburg
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**IN ARBITRATION PROCEEDINGS
PURSUANT TO AGREEMENT BETWEEN THE PARTIES**

IN THE MATTER OF A CONTROVERSY

BETWEEN:

**UNITED TRANSPORTATION UNION,
LOCAL 1741, UNION,**

and

FIRST STUDENT, INC., EMPLOYER,

**ARBITRATOR'S OPINION
AND DECISION**

**FMCS Case No. 040120-51937-A¹
DISCHARGE OF BEVERLY MCCLINTON**

This Arbitration arises pursuant to Agreement between United Transportation Union Local 1741, hereinafter referred to as the "Union," and First Student, Inc., hereinafter referred to as the "Employer," under which Dennis L. Isenburg was selected to serve as sole, impartial Arbitrator, whose decision shall be final and binding on the parties.

Hearing was held on September 16 and 17, 2004 in San Rafael, California. The parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of relevant exhibits, and for closing argument. A transcript of the proceedings was supplied to the Arbitrator. The Union and the Employer submitted

¹ This case number is the first case number identified to the Arbitrator. However, it is noted that the Employer also used the number FMCS 031209-0313-A

1 post-hearing briefs, which were received on November 20, 2004. The matter is
2 submitted.

3 **APPEARANCES:**

4 On behalf of the Union:
5 Victor C. Thuesen
6 11 Western Avenue
7 Petaluma, CA 94952-2906

8 On behalf of the Employer:
9 Thomas J. Dowdalls
10 Littler Mendelson
11 2175 North California Blvd, Ste 835
12 Walnut Creek, CA 94596-7360

13 **A. ISSUE**

14 Whether the discharge of the Grievant, Beverly McClinton, was for good cause. If not,
15 what shall be the remedy?

16 **B. RELEVANT PROVISIONS OF THE AGREEMENT (JX 1)**

17 Article 7. – Discipline

18 Section 1.

19 (a) No employee covered by this Agreement will be terminated or suspended
20 without just cause.

21 (b) At least one warning must be given under the progressive discipline system
22 except as stated in subsection C, below.

23 (c) In the event an employee commits or is alleged to have committed an act or
24 acts serious enough to warrant immediate discharge or suspension, the
25 Company may take immediate action.

(d) Any disciplinary action taken by the Company under this provision shall be
for just cause and the employee shall have recourse to the grievance and
arbitration procedures herein.

...

Article 8. – Disputes

Section 1.

(a) Any grievance or dispute which an employee or the Union may have with the
Company arising out of the application or interpretation of specific clause or
clauses of this Agreement or any policy the Union believes to be unjust shall be
adjusted according to the following procedure.

1 (b) Upon request by the Union, the Company will provide to the Union copies of
2 all relevant information, reports and other documents pertaining to the grievance
3 prior to any hearing or as such information becomes available.

4 Step 1 -The grievance shall be presented by the Union or employee to the
5 Contract Manager within five (5) working days after the cause of such
6 grievance occurs or should reasonably have been known by the employee
7 to occur.

8 Step 2- If the grievance is not satisfactorily resolved within five (5) working
9 days after Step 1, the grievance may be presented in writing by the Union
10 to the Region Vice President within five (5) days. The Region Vice
11 President or his/her designee shall meet with the employee and/or the
12 Union to determine the outcome within ten (10) working days after
13 submission of the grievance. The Region Vice President or his/her
14 designee shall render a written decision within five (5) days following the
15 meeting.

16 Step 3 -If the grievance or dispute is not satisfactorily resolved in Step 2,
17 the parties may submit the matter to the California Mediation and
18 Conciliation Service or any neutral third party agreed upon by parties
19 within thirty (30) days. If neutral cannot mediate the dispute, they shall
20 issue a written decision, which shall not be binding on either party. The
21 mediator's written decision shall not be presented to the arbitrator by
22 either party.

23 Step 4 -Either party may demand in writing arbitration of any unsettled
24 dispute. The right of either party to demand arbitration is limited to thirty
25 (30) calendar days from the final action taken on such dispute under the
last step of the grievance procedure immediately before arbitration.

Article 23 - General

Section 1

Written communications between the Company and U.T.U. will be answered promptly in writing.

...

Section 3

Upon request by an Employee, permission will be granted for the employee, at the earliest convenient time to such Employee and the Company, to examine his personnel and attendance record. Any portion of the record not comprehensible to the Employee will be explained. An employee's attendance/absenteeism record will be wiped clean at the beginning of each school year.

...

Section 5

In the event a driver notifies dispatch prior to his/her sign-in time of a potential late arrival, the dispatcher shall not assign a drivers route to someone else until 10 minutes past their sign-on. If the driver arrives during this period they shall claim their route but will be considered to have broken their guarantee.

1
2 Article 26 – Management Rights

3 The Union recognizes the right and responsibility of the Company to manage its
4 facility and to direct its working forces. Any of the rights, powers, prerogatives,
5 and authority that the Company had prior to the signing of this Agreement are
6 retained by the Company unless abridged, delegated, granted, or modified by
7 this Agreement.

8 Such rights and functions include, but are not limited to, (1) full and exclusive
9 control of the management of the Company, the supervision of all operations, the
10 methods, processes, means, and personnel by which any and all work will be
11 performed, the control of the property and the composition, assignment,
12 direction, and determination of the size and type of its working forces; (2) the
13 rights to change or introduce new and improved operations, methods, processes,
14 means, or facilities, and the right to determine whether and to what extent work
15 shall be performed by employees; (3) the right to determine the work to be done
16 and the standards to be met by employees covered by this Agreement; (4) the
17 right to hire, establish, and change work schedules, set hours of work, establish
18 classifications, promote, demote, transfer, release, and layoff employees; (5) the
19 right to establish work rules, regulations, policies and procedures, and the right to
20 modify or change existing rules and regulations from time to time, and (6) the
21 right to determine the qualifications of employees, and to suspend, discipline,
22 and discharge employees for cause, and otherwise maintain an orderly, effective,
23 and efficient operation.

24 The above enumeration of management rights is not inclusive and does not
25 exclude other management rights not specified. The exercise or non-exercise of
rights retained by the Company shall not be construed to mean that any right is
waived.

17 **C. RELEVANT PROVISIONS OF THE EMPLOYER’S “EMPLOYEE**
18 **HANDBOOK” (ER 21)**

19 **WAGE AND SALARY ADMINISTRATION (p.10)**

20 **Payroll Policy Statement & Procedure**

21 A schedule will be developed for each hourly employee. The immediate supervisor and
22 employee will be involved in the development and maintenance of an accurate
23 schedule. Once agreed upon, the employee will only be paid the scheduled (fixed)
24 amount unless the exception process is followed.
25

COMPANY RULES AND PERSONAL CONDUCT (pp 11-12)

FIRST STUDENT has itemized certain acts of unreasonable conduct that may be cause for disciplinary action or discharge. The very nature of our business -serving the public - requires that we perform with the utmost integrity.

The following represent, some but not all, of the types of conduct violations that shall be cause for immediate discharge:

- ...
2. Falsification of employment application or other company reports.
- ...
3. Dishonesty or theft or misappropriation of Company property.
- ...
9. Repeated violations that result in suspension and/or discharge.

Tardiness and Absences

FIRST STUDENT is contractually obligated to provide on-time delivery of students. Therefore, when a driver is absent or late. it causes considerable difficulty in completing bus schedules on time. If you find it necessary to be late or absent, you must notify your supervisor as early as possible. NOT later than the night BEFORE your bus run (except in emergency situations), and indicate the reason for being late or absent. If you know you are going to be late or absent for more than one trip or run, please report that fact. If not stated, it will be assumed the call covers one trip or run only. Habitual tardiness or absence will be cause for suspension and/or discharge. Please see the Attendance Policy for more detail.

D. FACTS

This grievance concerns the suspension and termination of Grievant from her position as a bus driver at the Employer's San Rafael, California facility. This facility employs about 25 bus drivers, plus a mechanic, a dispatcher, and two management employees. The Union represents the bus drivers.

The Employer's business at this facility is to transport children to and from public schools in Marin County, California. All of the children the Employer transports are enrolled in special needs programs in Marin County public schools, and range in age from pre-school to age 22. These programs are set up for physically, developmentally

1 and emotionally disabled children. The Employer contracts for this work with the Marin
2 Pupil Transportation Agency (MPTA).

3 The manager of the Employer's San Rafael facility is Cindy Sperling, the
4 Contract Manager. The other management employee is Cliff Waters, the Safety
5 Training Supervisor.

6 In October, 2002, Sperling received a letter² from Dennis Petri, the Executive
7 Director of MPTA. Petri's letter refers to a recent conversation with Sperling concerning
8 Grievant's bus route, and states that he had ". . .received several concerns in the past
9 weeks about the tardiness of this route." The letter also refers to one parent, and
10 states, "While he was not complaining, per se," [he] ". . .was trying to establish a regular
11 pickup time for his daughter." Petri did not testify, but Sperling testified that the phone
12 conversation did take place and that she did receive ER 6 in the mail.

13 Sperling also testified that she received ER 7, a copy of a series of email
14 messages sent by other persons working with MPTA and Marin County schools.³ The
15 emails discuss a problem one school was experiencing several months before (in
16
17

18 ² ER 6

19 ³ Counsel for the Union objected to the admission of this document on the grounds that it was not
20 produced to the Union after repeated requests for copies of all documents relating to this grievance. The
21 Arbitrator reserved ruling on this objection, and several others, until all evidence was presented and the
22 parties had submitted their briefs. The Arbitrator has now considered all the evidence and argument and
23 admits ER 7. It is relevant to the case here in that it is evidence that the Employer had previously been
24 warned that MPTA was concerned about the performance of Grievant, specifically her failure to meet the
25 requirement to deliver students on time. This supports the Employer's decision to review Grievant's on-
time performance when MPTA raised the issue again in October 2002. Of course, since there was no
further evidence concerning the facts that occurred to cause the emails to be sent, the Arbitrator is unable
to draw any further conclusions about this document. So, it was considered only as evidence that the
Employer had received previous complaints about Grievant's tardiness. Since this is a discharge case
based upon falsification of company records, the document has no bearing on the ultimate question
before the Arbitrator. The Arbitrator's concerns about the late delivery of these documents (they
apparently were delivered to the Union on the first day of this hearing) is discussed in the Opinion.

1 another school year) regarding late delivery of students on another route. This route
2 was driven by Grievant at that time.

3 On October 24, 2002, Sperling delivered to Grievant a two-page document
4 related to the Employer's Attendance Policy.⁴ The first page of this document is
5 obviously a form used in administering the program. It reflects that Grievant had
6 accrued ten points under the program and was being given a written warning, which
7 from the face of the form appears to reference the provisions of the Attendance Policy.⁵
8 The second page is a summary of the events upon which the ten points were assessed,
9 including a single point that same day for arriving late to work.⁶

10 Sperling testified that the next day, October 25, 2002, she wrote and gave to
11 Grievant a warning⁷ concerning two issues, both of which had occurred on that day.
12 The first was failing to call dispatch for approval before Grievant stopped at a Safeway
13 store in her bus, apparently after delivering her students to school and driving back
14 towards the yard where the buses are kept. The second issue is stated as follows:

15 My other concern is that your putting time down on your time sheet that states
16 your working when actually your either running late to work claiming the same
time as if you where here. This is falsification of your time sheet. The

17
18 ⁴ ER 8

19 ⁵ The Attendance Policy, referred to on several documents introduced at this hearing, was not
20 introduced. Since this case concerns a discharge for falsification, the Policy is not necessarily relevant.

21 ⁶ Counsel for the Union objected to the admission of this document on the grounds of late delivery also
22 (See footnote 3), and the Arbitrator reserved ruling on this objection for the same reason. Having
23 considered all the evidence and argument, the Arbitrator admits ER 8. The testimony of Sperling that she
24 delivered a copy of this document to Grievant, and that she discussed it with her, is uncontradicted. The
document is also relevant to the question of why the Employer took the action it did during this period of
time. The Arbitrator's concerns about the late delivery of these documents (they apparently were
delivered to the Union on the first day of this hearing) is discussed in the Opinion.

25 ⁷ ER 9, dated October 25, 2002

1 conversation that took place between you and I today was to let you know that
2 this type of behavior will not be tolerated and if it continues will lead to
suspension and or termination.

3 Bus drivers are responsible for preparing, on a daily basis, two documents that
4 are relevant to the issue. One is a time sheet reporting the driver's time on the job,⁸ and
5 the second is a "DBR," or daily bus report⁹. The time sheet is used to record the driver's
6 time on the job; the DBR is used to record time spent actually making stops for pickup
7 and delivery of students and the miles driven during those trips. The DBR is used for
8 revenue, i.e., billing of the client. Waters described the process as recording "the time
9 that we have students on the bus."¹⁰ Sperling testified that she added the hours
10 reflected on each driver's DBR for the purpose of billing; she also stated that she added
11 the hours reflected on Grievant's DBRs for the weeks of October 21 and 28, 2002, and
12 that she did not make any changes to the hours reflected on that DBR when she
13 prepared the bill to MPTA. Sperling testified that she focused on the falsification
14 reflected on Grievant's time sheet, not the DBR.

15 The customer (MPTA) prepares another document, the route sheet.¹¹ The route
16 sheet lists the time and the location of the pickups for the route driven by a bus driver.
17 On the document introduced by the Employer (ER 12), the time entries appear to have
18 several changes made to them, since numbers are lined out and different numbers
19 listed. However, these changes were not explained by any witness.¹²

21 ⁸ ER 10, 14, 23, and 25

22 ⁹ ER 11, 16, 24 and 26

23 ¹⁰ TR 184:19-20

24 ¹¹ ER 12 (a six-page document faxed by MPTA to the Employer on November 18, 2002), UN 5 and 7
(both one page, apparently the first page of ER 12, but with different entries than on ER 12)

25 ¹² Counsel for the Union objected to the admission of this document on the grounds of late delivery also
(See footnote 3), and the Arbitrator reserved ruling on this objection for the same reason. Having

1 On October 28, 2002,¹³ and October 31, 2002, Grievant responded to Sperling's
2 October 25 warning.¹⁴ In her October 28 response, Grievant asserts that the "Point
3 System" is improper. On October 31, Grievant refers to Sperling following her, and
4 apparently in response to Sperling's comments concerning falsification, states:

5 As far as putting down time for our time sheets, each individual driver
6 knows how much time can be allotted for his or her route, and under driving
7 conditions as far as adhering to traffic, pedestrians, weather conditions and the
8 loading and unloading of children, not to mention the sometime five minute
9 "Good-byes" for their parents; the time will vary from minute to minute, hour to
10 hour, and day to day.

11 My concern is to your hearsay and false accusations, in other words, you
12 are once again singling me out, and accusing me of being a petty thief and you
13 have altered my time sheet on many an occasion without my consent.

14 It is also to my knowledge that you have altered other driver's time sheet
15 without their consent and that you have altered the time on their time sheets, but
16 you did not change the mileage on their DVR'S to coincide with their time, these
17 are all major violation of labor laws.

18 Sperling took this letter as a rebuttal; she also testified that no other rebuttal was
19 provided by Grievant or the Union.

20 For the weeks beginning October 21 and 28, 2002, Sperling requested that Cliff
21 Waters observe the time that Grievant arrived at the yard and the time that she left the
22 yard to drive her route. When Grievant turned in her time sheet for the week of October
23 28 to November 1, 2002,¹⁵ Sperling compared the times Waters reported to her¹⁶ with

24 considered all the evidence and argument, the Arbitrator admits ER 12. Other copies of the first page of
25 this exhibit were introduced by the Union, and though the person who prepared and/or made the changes
to this document did not testify, it does illustrate the route creation and change process established by
Employer and MPTA. Thus it is relevant here for that purpose. The Arbitrator's concerns about the late
delivery of these documents (they apparently were delivered to the Union on the first day of this hearing)
is discussed in the Opinion.

¹³ UN 8

¹⁴ ER 13

¹⁵ ER 14.

1 the times Grievant recorded on her time sheet; and the times Grievant recorded for that
2 period on the DBR.¹⁷ Sperling testified that she prepared the November 4, 2002 notice
3 of suspension¹⁸ and the November 19, 2002 letter of termination.¹⁹ The Union filed a
4 grievance²⁰ and this arbitration resulted.

5 Sperling disciplined Grievant with written warnings on December 4, 2001,
6 February 2, 2002, and March 13, 2002.²¹ Each of these occurred in a prior school year,
7 and they concerned Grievant missing too much time due to emergencies, running late
8 on her route, and coming to work late. None of this discipline was for falsification, and
9 each was related to absence and tardiness. Sperling had also given Grievant a written
10 warning on October 21, 2002 for absence and tardiness.²²

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12
13
14 ¹⁶ ER 15 Counsel for the Union objected to the admission of this document on the grounds of late
15 delivery also (See footnote 3), and the Arbitrator reserved ruling on this objection for the same reason.
16 Having considered all the evidence and argument, the Arbitrator admits ER 15. This exhibit did not
17 prejudice the Union in the presentation of its evidence. The Arbitrator's concerns about the late delivery
18 of these documents (they apparently were delivered to the Union on the first day of this hearing) is
19 discussed in the Opinion.

20 ¹⁷ ER 16

21 ¹⁸ JX 2

22 ¹⁹ JX 3

23 ²⁰ JX 4

24 ²¹ ER 17, 18 and 19 Counsel for the Union objected to the admission of each of these documents on the
25 grounds of late delivery also (See footnote 3), and the Arbitrator reserved ruling on this objection for the
same reason. Having considered all the evidence and argument, the Arbitrator admits ER 17, 18, and 19.
They are Employer records which are not challenged on the basis of authenticity. The Arbitrator's
concerns about the late delivery of these documents (they apparently were delivered to the Union on the
first day of this hearing) is discussed in the Opinion.

²² ER 20 The four instances listed in this document are repeated in ER 8, dated October 24, 2002
Counsel objected to the admission of the first page of this document, for the reasons stated in other
objections. The objection is overruled.

1 Sperling verified her receipt of three letters²³ from the Union requesting
2 information concerning this grievance; she testified that she forwarded the letters to
3 counsel and did not, herself, respond to these documents.

4 The Arbitrator was provided with a copy of the Employee Handbook 2001-2002,
5 which explains various rules, practices and policies of the Employer.

6 Sperling testified that she sets "standard hours" with each driver, and this is done
7 by starting with a required fifteen-minute "check-out" time to inspect the bus, adding the
8 time it takes to drive to their first pick-up, allowing for the time required to drive the
9 assigned route, and adding "cleanup" time at the end of the day. This is done during
10 the first couple of weeks of the school year. Since Grievant was discharged, Sperling
11 has started to record these hours on a spreadsheet, but during 2002 she was not
12 maintaining such a record. Sperling was asked the following questions during cross-
13 examination:

14 Q. In the year 2002, the year that's in question here, did you ever sit down with
15 drivers or explain to them in any way what their start time was supposed to be?

16 A. I sat down with them, and I also told them in monthly safety meetings, they get
17 15 minutes for check-out; they get 10 minutes for a cleanup. They clean up in the
18 morning or the afternoon. And the times are established when they come and
see me individual and we talk. We take the DBR, the time sheet, and the route
sheet.

19 Q. Are you saying that the driver is to make up his or her own mind as to the
20 precise time of starting, depending on when the first pick-up is scheduled?

21 A. That is correct.

22 Q. So there wouldn't be anything posted anywhere or written that would tell us
23 when [Grievant] actually was supposed to start work, would there?

24
25 ²³ UN 1 (dated April 1, 2004), 2 (dated April 25, 2004) and 3 (dated July 4, 2004).

1 A. There's nothing written.

2 Q. Okay. All right. Is there any policy that says that it is to be written?

3 A. Not to my knowledge.

4
5 Sperling testified that she did sit down with Grievant and discuss her hours in this
6 fashion, but kept no records of this discussion.

7 Sperling testified that Petri, the representative of MPTA, came to the yard and sat
8 down with Grievant to discuss her route. Sperling testified that this meeting occurred
9 after Mr. Petri sent ER 6, but later corrected herself to state that the meeting occurred
10 well before the receipt of ER 6. Grievant testified that the meeting was after the receipt
11 of ER 6. Sperling also testified that Petri had called her after this meeting to complain
12 that Grievant was still running late, however, she did not make a record of this call.

13 Recalled as a witness during the Union's presentation of its case, Sperling
14 testified that Grievant's time sheets would be the only record that would show the times
15 Grievant was expected to come to work and to leave work, that these times were set by
16 verbal agreement, and that it was not written on any other document. Sperling also
17 testified that two other employees had been found to have falsified their time sheets.
18 Both were warned, and stopped the behavior. One employee was found recording a
19 start time of one hour prior to her first pick-up, and Sperling testified that this employee
20 said that others told her to record her time as she did.

21 Continuing her testimony during presentation of the Union's case, Sperling
22 identified another copy of the first page of ER 12, and it was marked and admitted as
23 UN 5. Un 5 bears a "Revised 10/8" entry not on ER 12, and Sperling testified that it
24 may have been the Route Sheet in effect during the weeks of October 21 and 28, 2002;
25 that changes were frequently made by MPTA to the Route Sheets, and that normally
MPTA would send those revisions directly to the dispatcher at Employer's premises.

1 Sperling also identified a document²⁴ which states that the Absence and Tardiness
2 Policy was made effective September 1, 2002; that under this policy at least one point
3 would be imposed for tardiness; that during the week of October 28 Sperling was aware
4 that Grievant was late every day, but she did not impose any points for those days.

5 Sperling also testified that the dispatcher was expected to note in the Log Book²⁵
6 every time a parent called complaining that a bus was late, but that the dispatcher
7 sometimes did not record every complaint; that Sperling also would make entries in the
8 Log Book, but that she also did not note every complaint; and that to her knowledge the
9 Log Book maintained during the weeks of October 21 and 28, 2002 has been thrown
10 out.

11 Waters testified that he was aware of the concerns about Grievant running late in
12 driving her route, having talked with both Petri and Sperling. He testified that Sperling
13 asked him to observe the time that Grievant arrived at the yard, and the time she left the
14 yard to drive her route. He did this for the weeks of October 21 and 28, 2002. He
15 further testified that he wrote the times down by hand on "Post-It" notes²⁶, later
16 transferred those times to a second handwritten document²⁷, then worked to prepare a
17 document on the computer with Sperling.²⁸ Waters testified that Petri had told him one
18 of the schools on Grievant's route was calling daily to report to him what time the bus
19 arrived.

20
21 ²⁴ UN 6

22 ²⁵ The Log Book maintained by the dispatcher was described at several points in the hearing, but no
23 copy of any entry in the Log Book was ever introduced.

24 ²⁶ ER 22

25 ²⁷ ER 15, second page

²⁸ ER 15, first page

1 Though he does work as a dispatcher, Waters helps the dispatcher by answering
2 phones when needed. He testified that during the first few weeks of school, many
3 parents call concerning when the bus driver will be picking up or dropping off their
4 children, but that such calls are infrequent after that time period.

5 Waters testified that some drivers arrive at the yard very early, "pre-trip" their bus
6 for 15 minutes, then relax until the time they need to leave to get to their first stop. In
7 such a case, Waters understands that the driver is to record, as the "Start" time, 15
8 minutes prior to the time he or she left the yard. Thus, a driver who arrives at 5:45, pre-
9 trips a bus for 15 minutes, then goes to the break room to relax before leaving the yard
10 at 6:20, would be expected to record 6:05 as the start time on his or her time sheet.

11 Carolyn Smith, a bus driver, testified that she has been employed by the
12 Employer since 1995; that she remembered the time when Grievant worked for the
13 Employer; that Grievant was often in the yard when she arrived at work, which was
14 about 6:15 or 6:30 am; and that she does not have any recollection of Grievant being
15 late to work every day during her last two weeks at work.

16 Mable Stallworth, a bus driver, testified that she has been a bus driver for the
17 Employer since 1995; that in 2002 she normally arrived at work at about 6:00 am,
18 checked her bus, then had some cereal and talked with the other drivers until she left to
19 drive her route at 6:35; and that she usually saw Grievant there when she arrived. On
20 cross examination and after reviewing her time sheet and DBR for the week of October
21 28, 2002²⁹, Stallworth testified that she was coming to work at about 6:25 that week,
22 and that she could not state when Grievant came to work that week.

23
24
25 ²⁹ ER 23 and 24

1 Gwen Head, a bus driver, testified that she has been employed by Employer for
2 nine years; that she commutes to work from Richmond; that she drives a shuttle bus for
3 other employees to ride in her commute; that she usually arrives at the yard at about
4 6:00 am; that when Grievant was working at the yard, she would normally see Grievant
5 when she arrived; that she is paid for time in checking her bus, plus the time to drive to
6 her first pick-up; that ER 25 is her time sheet for the week beginning October 28, 2002,
7 and ER 26 is her DBR for that week; and that since her first stop as listed on ER 26 was
8 6:45 am that week, she would have left the yard at 6:15 am.

9 Angela Beloy, the president and legislative representative of the Union, testified
10 that Jim Harford, the Union representative who signed the appeal to arbitration,³⁰ had
11 duties at the main office of the Union which would take him to Ohio for extended periods
12 of time; that when school let out in June the Union representatives did not see each
13 other until fall and school began; that sometime in 2003 Harford left the Union and she
14 became responsible for his duties; that as soon as she talked to counsel about this
15 matter she instructed him to pursue the arbitration; that she signed three letters
16 requesting information from the Employer concerning this grievance;³¹ that she does not
17 know if Harford received any of the information requested on the grievance; and that
18 she did not receive any of the information she requested until the morning this hearing
19 began.

20 The Grievant testified that:

- 21 • She was a bus driver for Employer from March or April 2001 until her
22 termination;

24 ³⁰ ER 1

25 ³¹ UN 1 (dated April 1, 2004), UN 2 (dated April 25, 2004), and UN 3 (dated July 4, 2004)

- She bid for the route in question;
- The route was changed from time to time;
- She did not know who made the changes;
- She received a revised route sheet to inform her of changes;
- She received UN 7³² and UN 5³³ to inform her of changes to her route;
- The effect of these changes was to add two students to her route;
- As a result of these changes, she started running late on her route;
- She asked Sperling for more time in order to get her students to school on time but Sperling refused her request;
- She never saw the letter from MPTA³⁴ to Sperling prior to her discharge;
- She met with Petri once and after discussing her concerns with him, he changed the time to pick up the student whose father had complained;
- She believes she saw Petri write something down on his copy of the route sheet;
- She had no more problems after that adjustment;
- The meeting with Petri was in the Employer's office and Sperling must have been aware of the meeting; and
- She was terminated very soon after that conversation.

Grievant also testified that:

- She believes she spoke with the father referred to in Petri's letter and apologized for being late

³² UN 7 bears an entry "Revised 10/1"

³³ UN 5 bears an entry "Revised 10/8"

³⁴ ER 6

- She also spoke with school representatives when she dropped off children, asking if they had been informed of her late arrival and they said no;
- She was suspended on November 4;
- She was called and told to come to the office on November 8, at which time she was informed she was terminated;
- She was told she was terminated for falsifying time sheets but not shown the documents she was alleged to have falsified;
- She did call in on October 24, 2002 and was told not to come to work until the afternoon;
- She was not late on October 18;
- She had never seen ER 12 as presented at the hearing, with the notes written on it;
- She never saw ER 15 before she was terminated;
- She was never asked if the times recorded on ER 15 were accurate;
- She was given ER 19 on a day when she had called in sick, but the dispatcher told her she was really needed, so she came in sick;
- She filled out her time sheets and DBRs to accurately reflect the work that she performed;
- She was elected to Chairperson of the Union in September 2002;
- Stopping at the Safeway was a common practice;
- Before giving her ER 9, Sperling had never given her examples of the alleged falsification discussed in ER 9;
- The times she wrote on the DBR were the times called for in the route sheet, not the times she actually arrived at those stops; and

- She recorded times on the DBR in that fashion throughout her employment.

E. POSITION OF THE EMPLOYER

1. Abandonment of the Grievance and Waiver of the Right to Arbitrate

Procedurally, the Union has waived the right to pursue this matter to arbitration by abandoning the claim for nine months. After processing the grievance through the steps of the procedure, the Union wrote to the Employer on March 2, 2003, appealing the matter to arbitration. After that, the Union made no contact with the employer concerning the grievance until December 12, 2003, when Union counsel wrote to the Employer requesting the selection of an arbitrator. The Employer raised the issue of waiver by return letter of December 22, 2003, and has agreed to arbitrate this grievance reserving its right to raise this procedural issue.

At no time has the Union presented evidence to explain its delay. The Employer was prejudiced by the delay, in that its witnesses could not recall details of events that had happened nearly two years earlier.

The Arbitrator should rule that the grievance has been abandoned and is no longer arbitrable.

2. The Employer Properly Terminated Grievant for Falsifying Her Timesheets.

Substantively, the evidence establishes that Grievant was terminated for falsifying her time sheets on numerous occasions, even after receiving a written warning that falsification of her time sheet would not be tolerated.³⁵

³⁵ ER 9

1 The Employer received a client complaint that Grievant's route was running late.
2 To investigate this, Sperling requested that Waters observe when Grievant arrived at
3 work. Waters did this, and also noted the time she left the yard for her route, beginning
4 October 25, 2002. Further, he drove the route himself, checking the time that it took to
5 drive from the yard to the first stop.

6 Based upon this investigation, the Employer concluded that Grievant had falsified
7 her time sheet every day of the workweek from October 28 to November 1, 2002. The
8 Employer suspended Grievant on November 4, and terminated her on November 8.
9 Having made it clear that Grievant was expected to make her pickups and deliveries
10 according to the schedule provided by the client³⁶ as well as giving her a written warning
11 that falsification would not be tolerated, Employer properly terminated Grievant.

12 The grievance should be denied.

13 **3. The Union Was Not Entitled To Discovery Through Use Of The Employer's**
14 **Duty To Provide Information.**

15 During the hearing Union counsel objected to several Employer exhibits on the
16 grounds that the documents had not been previously produced. It appears that the
17 Union was attempting to use the Employer's duty to provide information as a pre-
18 arbitration discovery device. There is no right to discovery in arbitration proceedings.
19 Also, Employer properly did produce the documents prior to beginning of the hearing on
20 September 16, 2004. If the Union thought that it was entitled to the documents earlier, it
21 should have filed a grievance or an unfair labor practice charge. The Union's objections
22 should be overruled.

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25 ³⁶ ER 8, 8.2, dated October 24, 2002

1 **F. POSITION OF THE UNION**

2 **1. The Employer's Failure To Conduct A Full And Fair Investigation Compels**
3 **An Award Of Reinstatement To The Grievant.**

4 The record establishes that the Employer failed to inform Grievant of the charges
5 in sufficient detail or to conduct a full and fair investigation into the claims that Grievant
6 falsified her time sheets. For instance, the letter suspending Grievant³⁷ informed her
7 that the action was taken "over your time sheets" and the letter advising Grievant of her
8 termination³⁸ gave no explanation of the reasons for the action. When the grievance
9 was filed on November 8, 2002,³⁹ it requested copies of all information, and this request
10 was never honored.

11 During the investigation, Sperling never talked to Grievant about Waters' alleged
12 observations. She also did not review the dispatch log, the only authentic record of
13 driver tardiness maintained by the Employer. This log is for the purpose of recording
14 incidents of tardiness as well as complaints from parents or schools concerning
15 tardiness. Sperling did not review the log, nor was it produced at hearing. Grievant
16 testified without dispute that Sperling never told her what she was investigating, and did
17 not show Grievant the time sheets at issue, with the result that Grievant never knew
18 what Sperling was investigating. Sperling also did not talk with Grievant's fellow drivers
19 Smith, Stallworth or Head. All of these circumstances demonstrate that the Employer's
20 investigation was inadequate. The Employer's conduct deprived Grievant of the
21 opportunity to defend against the charges.

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³⁷ JX 2

24 ³⁸ JX 3

25 ³⁹ JX 4

1 **2. The Employer Has Not Met Its Burden Of Proving Just Cause For Grievant's**
2 **Discharge.**

3 It is settled that the Employer bears the burden of proving that each charge
4 against Grievant is true. Here the Employer has failed to meet this burden. The
5 credible evidence is that the client had raised a question about a parent who "was trying
6 to establish a regular pick up time for his daughter" and that he had received a "couple
7 of telephone calls" about Grievant arriving with students after the school bell had rung.⁴⁰
8 The client met with Sperling and Grievant, and some adjustments to Grievant's
9 schedule were agreed upon. The evidence is that there were no difficulties after that
10 meeting. The only conclusion is that the discharge was not for just cause.

11 **3. The Penalty Of Discharge Is Inappropriate.**

12 Employer claims that Grievant was treated in the same manner as others who
13 have falsified time sheets. Sperling's testimony establishes that she had treated
14 Grievant differently than another employee accused of falsifying time sheets. That
15 employee was given a final written warning and a chance to explain, and given another
16 opportunity to improve. Here, the evidence does not support Employer's claims that
17 Grievant was in fact given a final written warning or that she was allowed to explain.

18 Additionally, Sperling testified that she billed the client during the period of time in
19 question as though Grievant had been on time, and thus herself falsified her revenue
20 submission to the client. She attempts to excuse her conduct on the basis that she was
21 focusing on Grievant's time sheets, but this is insufficient. Her conduct is important for
22 three reasons: 1) It is compelling evidence that Grievant was not in fact tardy as
23 claimed; 2) It shows that Sperling imposed the harshest of penalties on Grievant while
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25 ⁴⁰ ER 6

1 not penalizing herself at all for similar misconduct; 3) It suggests that Grievant's
2 alleged falsification is not as serious as the Employer claims.

3 For all these reasons, Grievant should be reinstated and made whole.
4

5 **G. OPINION**

6 **1. Procedural Issues**

7 **a) Employer's claim that the grievance has been abandoned and is** 8 **not arbitrable.**

9 The Employer argues that the passage of time between the Union's appeal of
10 this matter in March 2002 and the initial letter from the Union's attorney requesting
11 selection of an arbitrator in December 2002 constituted an abandonment of the
12 grievance. The Employer also points to Secrest's letter in response to the December
13 request from counsel,⁴¹ where Secrest asserts in that letter that he had called the Union
14 about the appeal and received no response. Finally, the Employer claims prejudice from
15 the Union's delay, asserting Employer witnesses had some difficulty in remembering
16 details of events that occurred almost two years prior to the hearing. As a result,
17 Employer argues that the grievance has been abandoned.

18 In response, the Union presented evidence that the Union representative during
19 the initial processing of the grievance, Harford, was away from his office in San
20 Francisco frequently and for long periods of time; that Harford went to Ohio for other
21 Union work; that during the summer (when school is not in session) the union
22 representatives did not see each other; and that Harford left the Union permanently in
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25 ⁴¹ ER 3

1 the fall of 2002.⁴² Finally, the Union witness asserts that as soon as she became
2 responsible for the matter, she instructed counsel to pursue the arbitration.

3 The Employer does not claim that these circumstances constitute a failure to
4 adhere to the various time limits stated in the grievance procedure. It appears that such
5 a failure did not occur. To this Arbitrator, then, the question of prejudice is key to the
6 decision on this issue. In this regard, the Arbitrator finds that Employer witnesses did not
7 demonstrate an inability to recall events in sufficient detail. Though, as explained below,
8 the Arbitrator finds that the Employer's proof is lacking in several regards, this is not the
9 result of a failure to recall events; rather, it is the result of actions the Employer
10 representatives failed to perform.

11 Additionally, it is noted that, apparently, the Union representative was very busy
12 and failed to follow-up on his responsibilities to continue the processing of the grievance.
13 Since this does not implicate the Grievant here in the delay, it would be unduly harsh to
14 rule that she is prejudiced by her representative's failure to proceed in a timely fashion.

15 Therefore, the Arbitrator rules that the grievance was not abandoned, and the
16 merits of this claim are properly before this Arbitrator.

17 **b. Union's objections to documentary evidence offered by**
18 **Employer due to failure to abide by contractual duty to produce.**

19 At several points in the hearing, Union counsel argued that documentary
20 evidence offered by the Employer should not be admitted in evidence, due to a failure to
21 provide the Union with documents requested. The Union pointed to the grievance⁴³ and

23 ⁴² Testimony of Beloy, TR 328-331.

24 ⁴³ JX 4

1 to three letters written to the Employer requesting this information.⁴⁴ Finally, the Union
2 requested that this Arbitrator sign a subpoena. The documents responsive to that
3 subpoena were delivered to the Union counsel just prior to the opening of this hearing.
4 Union counsel argued that the failure to deliver these documents to the Union when
5 initially requested should result in a ruling barring their admission in the hearing.

6 In its brief, the Employer argued that there is no pre-hearing discovery in
7 arbitration, thus no requirement to produce the documents until they were produced.

8 The Employer's argument is generally correct, unless there are contractual
9 commitments that require production. There are two clauses in the parties' agreement
10 that undermine the Employer's argument. Article 8, Section 1, paragraph b) commits
11 the Employer to provide documents "upon request," and such a request was made in
12 the initial written grievance as well as subsequent letters. Also, Article 23, Section 1
13 requires prompt reply to letters. The Employer failed to adhere to either provision, in the
14 opinion of the Arbitrator.

15 However, as indicated in the rulings noted in the footnotes to this Decision, the
16 Arbitrator believes that exclusion would undermine the broader purpose of providing the
17 parties the opportunity to present their case fully and with all relevant evidence, including
18 documents. So, these documents are admitted.

19 **c. Arbitrator comments on procedural issues**

20 Both parties were dilatory in processing this grievance efficiently; the Union in not
21 following-up on the appeal to arbitration for nine months, the Employer in not responding
22 to four requests for information until a subpoena was served. This had the effect of
23 prolonging the hearing, and this Decision, unnecessarily. Had the parties been more
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25 ⁴⁴ UN 1, 2, 3

1 ready to communicate fully and promptly, this case may well have settled. It is hoped
2 that the parties bear this in mind in future grievance proceedings.

3 **2. Substantive Issue - Merits of the Discharge**

4 **a. Just Cause and the Burden of Proof**

5 As recognized by the parties, in a case of discipline the burden is upon the Employer
6 to prove that just cause exists for the termination of Grievant. This burden includes:

- 7 1) Proving the facts supporting the decision to discharge, and,
- 8 2) Demonstrating that discharge is an appropriate action in light of
9 the facts proven.

10 Every arbitrator must determine his or her approach to defining just cause and
11 applying the term to the individual case under consideration. In discussing the various
12 terms used to refer to this concept, Arbitrator McGoldrick persuades this Arbitrator:

13 [It is common to include the right to suspend and discharge for "just cause,"
14 "justifiable cause," "proper cause," or quite commonly simply for "cause." There
15 is no significant difference between these various phrases. These exclude
16 discharge for mere whim or caprice. They are, obviously, intended to include
17 those things for which employees have traditionally been fired. They include the
18 traditional causes of discharge in the particular trade or industry, the practices
19 which develop in the day-to-day relations of management and labor and most
20 recently they include the decisions of courts and arbitrators. They represent a
21 growing body of "common law" that may be regarded ... as part of a new body of
22 "common law of Management and labor under collective bargaining
23 agreements." They constitute the duties owed by employees to management
24 and, in their correlative aspect, are part of the rights of management. They
25 include such duties as honesty, punctuality, sobriety, or, conversely, the right to
discharge for theft, repeated absence or lateness, destruction of company
property, brawling and the like. Where they are not expressed in posted rules,
they may very well be implied, provided they are applied in a uniform, non-
discriminatory manner.⁴⁵

22 This standard is well established and much-debated, but as this Arbitrator
23 believes, in application it is simply based upon an analysis of the facts, applicable
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25 ⁴⁵ As quoted in "How Arbitration Works" by Elkouri and Elkouri (Fifth Edition), at p.887.

1 documents and relevant agreements/laws/regulations in the individual case at hand.
2 Basic common sense is always a valuable guide. Fundamental to the analysis is a
3 simple focus:

4 In the circumstances of the individual case,

- 5 1) Has the Employer proved the facts cited as the reason for the
6 discipline, and,
- 7 2) Given the needs of Employer, the Employee, and the Union as
8 the representative of all employees in the unit, is it within the
9 reasonable and rational expectation of the parties to this
10 contract that an employer can discharge an employee for this
11 reason?

12 Concerning the sufficiency of proof, this Arbitrator reviews the record very
13 carefully to determine whether the evidence establishes that the offense claimed was
14 committed. Underlying this review is the need for the Arbitrator to be satisfied that the
15 offense did occur, and this is especially necessary where, as here, the offense charged
16 is considered so serious by the Employer that it resulted in termination of Grievant's
17 employment with virtually no progressive discipline. With reference to the "standard" to
18 be used in this assessment, this Arbitrator appreciates and applies the comments of
19 Arbitrator Kates in Weirton Steel Company, 50 LA 103, 106:

20 My view is that if an arbitrator is convinced, after considering all the relevant
21 competent evidence, that an alleged offense has occurred, he may so find
without consciously apply any particular rule as to degree of proof.

22 The fundamental issue, therefore, is that the Arbitrator must be convinced that
23 the offense did occur. The Arbitrator does not attempt to describe this as a finding
24 based upon a "preponderance of the evidence," "clear and convincing evidence," or
25

1 “evidence beyond a reasonable doubt.” Such a term does not seem necessary or
2 warranted.

3 In the case here, the Employer’s evidence is predominately based upon action
4 taken against Grievant for an absence and tardiness problem. The Employer has an
5 Attendance Policy, but it was not even produced at this hearing. Rather, the Employer
6 terminated the Grievant for falsifying company records, namely her time sheet and her
7 DBR. The falsifications allegedly occurred during one week, from October 28 through
8 November 1, 2002. So, rather than a case based upon the Employer’s right to expect
9 attendance and punctuality as required in the Employer’s business, this case is based
10 upon a claim of falsification of two records prepared by the Grievant during that week.
11 Because the Arbitrator is not persuaded that the Grievant intentionally falsified these
12 reports, the grievance is sustained.

13 **b. Analysis of The Evidence of Falsification**

14 The “tests” for just cause are well known and basically intuitive. The
15 requirements include fair and careful consideration of the evidence, an opportunity to be
16 heard, and substantial evidence that the Grievant did commit the act used as a basis for
17 discharge. Here, the Employer case has several problems.

18 **1) There is no clear rule or instruction concerning**
19 **preparation of the time sheet and DBR.**

20 The Employer appears to be arguing that the Grievant falsified company records
21 because she failed to enter the exact time she arrived at work on her time sheet, and
22 the exact time she reached her first stop on the DBR. However, the Employer’s own
23 evidence leaves this subject vague. Initially, there is no written Employer rule
24 describing the preparation of these documents. Very simply, there is no Employer rule
25 that states that an employee is to enter the exact time he or she arrives and leaves.

1 Also, the Employer knows that some employees arrive quite early, and that some
2 drivers will pre-trip their bus immediately, while others may wait for a while, having
3 coffee or talking with other drivers.

4 At the time of the events here under consideration, the Employer had a casual
5 method of determining when an employee may “start” work, that is, when they may
6 enter their start time. Though the employees met with Sperling to discuss this subject,
7 nothing was written to memorialize this discussion. More importantly, the Employee
8 Handbook makes clear that “Once agreed upon, the employee will only be paid the
9 scheduled (fixed) amount unless the exception process is followed.” As a result, it
10 appears that employees usually enter their fixed schedule on the time sheet. In fact,
11 each time sheet in evidence (ER 10, 14, 23 and 25), including those of Head and
12 Stallworth, indicate a pattern of entering this fixed schedule. The Arbitrator is using
13 common sense in this analysis, and is assuming that Head and Stallworth did not in fact
14 begin working and finish their work at precisely the same time each day, rather it
15 appears that they, like Grievant, simply entered the fixed schedule they were expected
16 to follow. This makes sense given the handbook provision involved. Why put down
17 precise times when it doesn’t matter, because you will be paid for the fixed schedule
18 anyway?

19 The same analysis applies to the preparation of the DBR. Each DBR in evidence
20 (ER 11, 16, 24 and 26) indicates a pattern of entering the scheduled time, not the actual
21 arrival time, on each day. The Employer cannot be seriously arguing that Stallworth
22 arrived at her first stop at precisely 7:30 every day, and her last stop at 8:30 or 9:05
23 each day; or, that Head arrived at precisely 6:45 and 9:15 each day...

24 The purpose of the DBR supports a further observation. It appears that the DBR,
25 used as a basis for billing the client, is expected to show the fixed schedule referred to

1 above. Even in the case of Grievant, the figures she entered were used to bill the client,
2 at the same time as she was being considered for termination because she falsified that
3 document. The Arbitrator does not accept the Employer's argument that these are two
4 different matters. At the very least, as argued by the Union, the Employer's use of
5 these figures indicates that the importance of precise time entry is not what the
6 Employer urges with regard to its discipline of Grievant.

7 Of further note is the testimony of Grievant, stating that she has filled out her
8 DBR the same way throughout her employment. This testimony was credible and is
9 credited.

10 The Arbitrator concludes that there is no clear and enforced rule concerning the
11 preparation of the time sheet or the DBR.

12 **2) The Grievant was not given the chance to respond to the**
13 **allegations of falsification.**

14 On this point there is no real dispute. Arbitrators have long expected that an
15 employee will be confronted with the evidence and asked to respond before a
16 determination to discipline is made. Here, it appears that there was not even an attempt
17 to do this. The importance of this seems to be underscored by the facts here. Given
18 the circumstances of how the time sheet and DBR are prepared as discussed above,
19 the Arbitrator believes that if Grievant had been asked she would have responded as
20 she did at the hearing. If other employees had been asked also, the Arbitrator believes
21 they would have said the same thing. That is, most if not all employees would probably
22 say they entered their scheduled times on those documents. This would have
23 forewarned the Employer that discharge for falsification was not appropriate.

24 The warning given to Grievant on October 25 is not clear enough concerning the
25 issue of what the Employer considers falsification. It is the second paragraph of a letter

1 criticizing her for going to Safeway on the way back to the yard, having nothing to do
2 with picking up or delivering students. In the opinion of the Arbitrator, the responses of
3 Grievant, on October 28 (UN 8) and October 31 (ER 13), should also have alerted the
4 Employer that Grievant did not understand what the Employer meant by its warning of
5 October 25. Again, had Grievant been questioned concerning this matter, the Arbitrator
6 believes that she would have responded as she did at hearing, and that as a result the
7 Employer would have given serious consideration to the propriety of termination for
8 falsification.

9 **3) The Employer's warnings and discipline did not give**
10 **Grievant sufficient warning of the Employer's concerns.**

11 Up to and including the warning of October 24 (ER 8), Employer's
12 communications to Grievant concerned tardiness and absenteeism. The Employer was
13 applying its Attendance Policy. Though not presented with this policy or any evidence
14 concerning its terms, the Arbitrator assumes that the Employer's actions would be
15 defensible concerning some level of discipline under its Attendance Policy.

16 However, on October 25, in the second paragraph of a letter of warning, the
17 Employer for the first time raised the issue of falsification. As suggested above, even
18 then the reference to falsification was imprecise. Then, after one more week, the
19 Employer suspended the Grievant "over your time sheets," and in a few more days
20 informed her she was terminated. Even falsification, which the Arbitrator does not
21 condone, must be supported by more evidence of fair warning, clear explanation, and
22 an opportunity to improve. The Arbitrator finds that the circumstances here do not
23 warrant the application of Article 7(c), which would allow immediate suspension

24 In light of the evidence here, there is insufficient evidence to support any
25 discipline for falsification.

1 **3. A Caveat**

2 The Arbitrator does credit the evidence that Grievant was having difficulty arriving
3 to work on time and that she was also having difficulty driving her schedule in a timely
4 fashion. As noted, to the Arbitrator it appeared that the Employer was following its
5 Attendance Policy in administering the initial levels of discipline (points, warning) placed
6 in evidence in this case. Nothing in this Opinion should be read as a ruling on that
7 Policy or its application, to Grievant or others. That issue was not placed before this
8 Arbitrator.

9
10
11 **H. AWARD**

12 The grievance is sustained.

13 The Grievant will be reinstated and made whole.

14 The Arbitrator retains jurisdiction of this matter only for the purpose of
15 interpretation or application of this award.

16
17
18 **Dated this 30th day of January, 2005**

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20
21 _____
 Dennis L. Isenburg, Arbitrator